87-1498

Supreme Court, U.S.
FILED
FEB 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

LORAN W. ROBBINS, et al.,
Cross-Petitioners,

v.

EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,
Cross-Respondents.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

May the parties to a trust agreement governing multiemployer employee benefit trust funds contractually agree to a statute of limitations to govern Trustee collection actions arising under the LMRA and ERISA in the absence of a limitations period in either statute or a generally applicable federal statute of limitations?

Our office received the original Petition
on February 23, 1988.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, Loran W. Robbins, et al.,[1] respectfully request this Court to grant this Conditional Petition for a Writ of Certiorari to review certain aspects of the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on September 21, 1987 in the event Ace Lines and/or Iowa Road Builders file a Petition for Certiorari and such Petitions are granted.

OPINIONS BELOW

The opinion of the District Court for the Southern District of Iowa in *Robbins v. Easter Enterprises, Inc.* is reported at 650 F. Supp. 199 (Appendix A). The opinion of the District Court for

[1] Cross-Petitioners, Plaintiffs-Appellants below, were the Trustees of the Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds at the time the actions commenced: Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Earl L. Jennings, Jr., Howard McDougall, Robert J. Baker, Thomas F. O'Malley, and R.V. Pulliam, Sr. Messrs. Yates, Jennings and O'Malley are no longer Trustees. In their place are: Robert S. Sansone, R. Jerry Cook and Arthur H. Bunte, Jr.

the Southern District of Iowa in *Robbins v. Iowa Road Builders Co.* is not reported. (Appendix B). The opinion of the Court of Appeals for the Eighth Circuit is reported at 828 F.2d 1348. (Appendix C).

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1987. Cross-Petitions for Rehearing *en banc* were filed on October 30, 1987. On November 24, 1987, the Petitions for Rehearing were denied. (Appendix D). The judgment was issued as a mandate on December 17, 1987 (Appendix E). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* (ERISA), and the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 141, *et seq.* (LMRA), are set forth in Appendix F.

STATEMENT OF THE CASE AND REASONS FOR FILING A CONDITIONAL CROSS-PETITION

The actions giving rise to this Conditional Cross-Petition commenced when the Trustees of the Central States Pension and Health and Welfare Funds (Central States) filed suit to collect delinquent contributions claimed to be owed by two Iowa companies pursuant to collective bargaining agreements, participation agreements, and the Trust Agreements governing the Funds. Suit was brought under the LMRA and ERISA as well as under the Trust Agreements governing the Funds. Article III, Section 4 of each Trust Agreement expressly authorizes the Trustees to initiate judicial proceedings (if necessary) to collect delinquent contributions. The Trust Agreements also contain a "choice of law" provision which requires the application of Illinois law to all

matters arising in connection with the Trusts unless preempted by federal law.[2]

Neither the LMRA nor ERISA contains a statute of limitations governing Trustee collection actions. Characterizing their collection actions as suits "for the judicial enforcement of the trust terms," in accordance with this Court's decision in *Schneider Moving and Storage Co. v. Robbins*, 466 U.S. 364 (1984), and Article III, Section 4 of the Trust Agreements, Central States argued that the ten-year statute of limitations applicable to actions on written contracts in the State of Illinois should govern, since Illinois law had been agreed to by both employers. Alternatively, Central States argued that the ten-year statute of limitations applicable to actions on written contracts in the State of Iowa should control the Trustees' suits. In contrast, both employers contended that the two-year statute of limitations governing actions arising under the Iowa Wage Payment Collection Law (IWPCL) should control the actions.

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[2] Prior to March, 1985, Article XIV, Section 7 of the Trust Agreement governing the Pension Fund and Article XI, Section 7 of the Trust Agreement governing the Health and Welfare Fund provided:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

In order to clarify this "choice of law" provision, the above articles were amended to provide, expressly, that the Illinois statute of limitations governing actions on written contracts would govern Trustee collection actions. These provisions now state:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States. In all actions taken by the Trustees to enforce the terms of this Trust Agreement, including but not limited to actions to collect delinquent contributions from employers or to conduct audits of contributing employers' records as authorized by Article III of this Agreement, the ten-year Statute of Limitations applicable to actions on written contracts in the State of Illinois shall apply.

The District Court for the Southern District of Iowa ruled in two separate opinions that Iowa had the most significant relationship to the limitations question and that the two-year statute of limitations applicable to Iowa's Wage Payment Collection Law was "the most analogous Iowa statute of limitations." In both cases, the Trustees' relief was substantially or completely time-barred. A consolidated appeal followed.

The Court of Appeals for the Eighth Circuit reversed, holding "that the 'most appropriate' characterization of trustee actions under ERISA to collect delinquent contributions for statute of limitations purposes is as actions for breach of written contracts," 828 F.2d 1354. In rejecting the wage payment analog,[3] the court relied heavily on this Court's decision in *Schneider, supra:*

> More importantly, however, we think that the Third Circuit's position, which was followed by the district court in the present case, must be reconsidered in light of the Supreme Court's subsequent treatment of trustee actions under ERISA in *Schneider Moving* and *Central Transport.* In each case, the Supreme Court distinguished actions brought by the trustees of employee benefit trust funds to enforce the trust agreements, whether brought directly under trust agreements or indirectly as third-party beneficiaries under collective bargaining agreements, from actions brought by either unions or employers to enforce collective bargaining agreements, and clearly characterized trustee actions under ERISA as actions to enforce the trust agreements and not as actions to enforce the collective bargaining agreements. *Central Transport,* 472 U.S. at 569-82; *Schneider Moving* 466

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[3] As the cases cited by the Eighth Circuit reveal, the majority view is that Trustee collection actions are to be regarded as actions on written contracts for purposes of selecting a statute of limitations. In support of the Wage Payment statute of limitations, Appellees and the District Court relied on two Third Circuit opinions: *Teamsters Pension Trust Fund v. John Tinney Delivery Service, Inc.,* 732 F.2d 319 (3d Cir. 1984), and *Byrnes v. DeBolt Transfer,* 741 F.2d 620 (3d Cir. 1984). Hence, a conflict exists among the Circuits.

U.S. at 371-76; *see also NLRB v. Amax Coal Co.*, 453 U.S. at 337.

828 F.2d at 1354-55. Nevertheless, the Court rejected the Trust Agreement "choice of law" provision as "inapposite" to actions arising under federal law. *Id.* at 1352-53. Neither the Eighth Circuit nor any other court has explained why an agreement on limitations is unenforceable as a matter of federal law.

As Central States argued below, there is no Supreme Court precedent, no federal conflicts rule, and no federal common law principle that requires a district court to apply the statute of limitations of the forum state when the parties to a judicial proceeding arising under a federal statute lacking a statute of limitations have contractually selected a different limitations period for the governance of their disputes. *See UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), and *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Indeed, forum selection clauses having the same practical effect as an agreement upon the statute of limitations were upheld by this Court as *prima facie* valid. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (case arising under federal admiralty law).

Although Central States prevailed below on its general contract theory, the Eighth Circuit's ruling is likely to be viewed as precedent that fund trust agreements cannot, as a matter of federal law, supply the limitations period for actions arising under ERISA and the LMRA even if the state statute selected is "most appropriate" under *DelCostello, supra*, reasonably related to the locus and subject matter of the dispute (as is Illinois), and promotes the objectives of the federal statutes involved. The Eighth Circuit's *lex fori* approach to the statute of limitations issue will therefore undermine the ability of the Central States Funds to obtain uniform and adequate recovery not only within the Eighth Circuit but throughout the Circuits because the

statute of limitations for actions on written contracts varies so greatly from state to state.[4]

As this Court has twice observed, the Central States Pension and Health and Welfare Funds are two of the largest employee benefit trusts in America. *Schneider Moving and Storage Co. v. Robbins,* 466 U.S. 364 (1984); *Central States, Southeast and Southwest Areas Pension Fund, et al. v. Central Transport,* 472 U.S. 559 (1985). Some 11,500 employers in 34 states contribute to these Illinois-based Funds pursuant to thousands of collective bargaining agreements with Teamster Local Unions. Under ERISA, Trustees have a fiduciary duty to collect delinquent contributions. *Central States v. Central Transport, supra.* To expedite collections, ERISA's venue provision (29 U.S.C. § 1132(e)) permits the Trustees to sue delinquent employers in any state in which they do business, reside or can be found. The Trustees *cannot* avail themselves of ERISA's liberal venue provision (which serves to make collection actions less costly) unless they can rely on the Trust Agreement "choice of law" provision which will permit uniform recovery throughout the states in which the Funds are entitled to file suit. Hence, the enforceability *vel non* of the "choice of law" provision is an issue of utmost practical significance to the Central States Funds (and to the Trustees of other funds who may likewise wish to facilitate a uniform remedy through the vehicle of the funds' trust agreements).

In view of the fact that Central States prevailed on its alternative theory, this Conditional Cross-Petition is being filed in

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[4] Within the Eighth Circuit alone, the following variation exists: Arkansas (four years); Iowa (ten years); Minnesota (six years); Missouri (five years or ten years); Nebraska (five years); North Dakota (six years); South Dakota (six years). Moreover, the issue has not been resolved with certainty even in the Eighth Circuit. In *Central States, Southeast and Southwest Areas Pension Fund v. King Dodge,* No. 86-2050 (decided December 23, 1987), a different panel of the Eighth Circuit ruled that the Trustees' collection action was governed by Missouri's ten-year statute of limitations for actions based on written promises to pay money. (App. F). While the Court acknowledged the prior decision in *Ace Lines,* it stated: "However, because under either Illinois law or Missouri law a ten-year statute of limitations applies, *we need not decide definitively which state's statute to apply*" (emphasis added).

order to preserve its ability to argue the specific question whether parties to a multiemployer employee benefit trust can select the "most appropriate" statute of limitations by contractual agreement. If Ace Lines and/or Iowa Road Builders file Petitions for Certiorari, Central States will present a full statement of facts and further arguments in support of its Cross-Petition in its Brief in Opposition to the Petition. If Ace Lines and/or Iowa Road Builders do not file Petitions, this Conditional Cross-Petition will be withdrawn.

CONCLUSION

For all of the reasons stated above, Central States respectfully requests this Court to grant this Conditional Cross-Petition in the event it also grants Ace Lines' and/or Iowa Road Builders' Petition for Certiorari.

Respectfully submitted,

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APPENDIX

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Appendix A

APPENDIX A

IN THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

LORAN W. ROBBINS. et al.,
Plaintiffs,

vs.

EASTER ENTERPRISES, INC.,
d/b/a ACE LINES, INC.
Defendant.

CIVIL NO. 83-687-B
MEMORANDUM

This is an action for failure to make contributions to union trust funds. Jurisdiction is premised on the Employee Retirement Income Security Act (ERISA), as amended by the Multi-Employer Pension Plan Amendments Act (MEPPAA), 29 U.S.C. § 1132. Plaintiffs, none of whom are citizens of Iowa, are trustees of the funds. Defendant, d/b/a Ace Lines, Inc., is an Iowa corporation with its principal place of business in Iowa.

This matter comes before the Court on Plaintiffs' appeal of an Order by United States Magistrate R. E. Longstaff partially denying plaintiffs' motion to amend their complaint. The issue presented is whether the Magistrate was correct in holding that the claim asserted in Count 1 of the amended complaint are confined by the two-year statute of limitations contained in §614.1(8) of the Iowa Code.

Both sides agree that in cases such as this, in which the applicable federal statutes prescribe no limitations period, the Court ordinarily must borrow "the most closely analogous statute of limitations under state law." *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983). However, when adoption of state statutes would be at odds with the purpose or operation of federal substantive law, timeliness rules have been drawn from federal law. *Id.*, at 162.

Appendix A

Plaintiffs contend that the appropriate statute of limitations is Illinois' 10-year statute for written contracts. They acknowledge that the Court must apply Iowa choice-of-law rules to determine which State's substantive law should be used. Iowa has adopted the "most significant relationship" analysis for resolving choice-of-law questions. See Restatement (Second) Conflicts of Law. Under § 187 of the Restatement, the law of the state chosen by the parties to govern their contractual rights ordinarily will be applied. The trust agreements, which establish the trust funds and give plaintiffs the authority to enforce defendant's contribution obligations, provide that the agreements "shall in all respects be construed according to and governed by the laws of Illinois." Plaintiffs argue that, in accordance with § 187, Illinois law should provide the limitations period for this action. They maintain that the most analogous Illinois statute of limitations is the 10-year statute for actions on written contracts. Ill. Rev. Stat. Ch. 110 §13-206.

In response, defendant asserts that the language in the trust agreements requiring resort to Illinois law is of no relevance because the present action is one to enforce the collective bargaining agreements. The latter contain no such language. Defendant further asserts that, because § 187 of the Restatement has no bearing on this matter, a "most significant relationship" analysis results in application of Iowa law. In particular, defendant posits the applicability of Iowa Code §614.1(8), which establishes a limitations period of two years for actions to recover "wages," defined to include payments to employee benefit funds. Iowa Code § 91A.2(4).

Although plaintiffs' right to institute this lawsuit is derived from ERISA and the Trust Agreements, the gravamen of plaintiffs' complaint is defendant's alleged failure to comply with its obligations under the collective bargaining arguments. Consequently, the Court agrees with defendant that the Illinois law proviso of the trust agreements is inapposite. The Court also agrees that Iowa has the most signficant relationship to this action

and that the most analagous Iowa statute of limitations is the two-year statute found at § 614.1(8). *Teamsters' Local Union No. 90 v. J.C. White*, 333 N.W. 2d 839 (Iowa 1983); *Teamsters Pension Trust Fund v. John Tinney Delivery Service*, 732 F.2d 319, 323 (3rd Cir. 1984). Finally, the Court believes that a two-year limitations period for actions to collect delinquent employee benefit plan contributions is no more too short to comport with congressional policy than a 10-year period would be too long. *See Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620 (3rd Cir. 1984).

The Court has considerable foreboding about the financial soundness of trust funds when there is no relationship between payments into the funds and benefits paid from the funds. The Court recognizes that a two-year statute of limitations places added burdens on the trustees, who are charged with enforcing a voluntary payment system but who are restricted in their use of costly annual audits. However, the Court also recognizes the problems created for labor and management when the trustees, who are not parties to the collective bargaining agreements, interpret the agreements in a manner that could result in the imposition of financial burdens not contemplated by the parties at the time the agreements were reached. It would be disruptive of labor peace and anomolous to allow a third-party beneficiary a longer period of time to sue under a collective bargaining agreement than is available to the parties to the contract. Of course, if fraud is involved, the trustees would not be confined to the two-year period of limitations.

There remains the question of whether plaintiffs' amended complaint should relate back to the date this action was originally filed. Defendant contends that there should be no relation back because, while plaintiffs' initial complaint was concerned merely with the accuracy of defendants' recordkeeping, the amended complaint alleges that a substantial group of employees was improperly excluded from coverage under the benefit plans. This, defendant urges, makes plaintiffs' new complaint essentially a new lawsuit. Again, the Court is constrained to agree with

defendant. Under Rule 15(c) of the Federal Rule of Civil Procedure, a claim in an amended pleading will relate back to the date of the original pleading if the claim arose out of the same conduct, transaction, or occurrence. Here, although both the original and amended complaints allege noncompliance with the contribution requirements of the employee benefit plans, the Court is unwilling to say that defendants had fair notice of plaintiffs' claim for expanded coverage. The amount sought by plaintiff as relief soared from approximately $88,500 to $1.15 million. Part of this increase is attributable to an ERISA penalty provision that effectively rewards plaintiffs for their delay in filing the amended complaint. See 29 U.S.C. § 1132(g) (2). Under the circumstances, the Court will restrict plaintiffs' claim in Count 1 to losses incurred no earlier than two years before filing of the amended complaint.

Except as thus modified the Magistrate's Order of January 23, 1985, is affirmed.

IT IS SO ORDERED.

Signed this 11 day of October, 1985.

(s) W. C. STUART, *JUDGE*
SOUTHERN DISTRICT OF IOWA.

Appendix B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LORAN W. ROBBINS, et al.,
Plaintiffs,

vs.

IOWA ROAD BUILDERS COMPANY,
Defendant.

CIVIL NO. 84-471-A
ORDER

The Court has before it defendant's motion for summary judgment. A hearing on the motion was held on October 3, 1985; appearances are noted in the Clerk's minutes for that date. Additional briefs have since been filed, and the motion is now ready for ruling.

This is an action for an employer's alleged failure to make contributions to two employee trust funds. The defendant is an Iowa corporation with its principal place of business in Iowa. The plaintiffs, none of whom are citizens of Iowa, are trustees of the funds. Jurisdiction is premised on the Employee Retirement Income Security Act ("ERISA"), as amended by the Multi-Employer Pension Plan Amendments Act ("MEPPAA"). 29 U.S.C. § 1132.

At the core of this lawsuit are two agreements reached between defendant and Teamsters Local Union No. 90. The first, a collective bargaining agreement dated April 30, 1979, governed defendant's operations in Ames, Iowa. It required defendant to make contributions to the trust funds at defined rates. The second agreement was embodied in a letter dated September 30, 1981, and concerned defendant's operations in Des Moines, Iowa. It purports to allow defendant to make contributions for certain employees of its Des Moines operations at the reduced rate applicable to its Ames operations. Although this lawsuit seems to center on a dispute over the effect to be given these two agree-

ments, the present motion for summary judgment may be resolved without further reference to that dispute.

Defendant bases its motion on plaintiffs' failure to bring this lawsuit within the two-year statute of limitations found at § 614.1(8) of the Iowa Code. Defendant alleges, and plaintiff has not denied, that plaintiffs' cause of action accrued no later than November, 1981. The complaint herein was not filed until June 22, 1984.

The question the Court must answer is what statute of limitations to apply. Both parties agree that the Court must first determine which State's law to apply, and then the Court must borrow "the most closely analogous statute of limitations under state law." *Del Costello v. Internat'l Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). Plaintiffs assert that either Illinois' or Iowa's 10-year statute for written contracts should be applied.

The precise reasoning of plaintiffs' resistance to defendant's motion is uncertain, a result of the fact that plaintiffs' "Memorandum of Points and Authorities" and "Supplemental Resistance to Defendant's Motion for Summary Judgment" both appear to have been tailored more to fit the facts of a parallel case rather than this case. In the parallel case, Ace Lines, Inc., had signed a collective bargaining agreement similar to that signed by defendant. Ace Lines had also signed trust agreements that incorporated the collective bargaining agreement and provided that the trust agreements were to be governed by Illinois law and enforced by the trustees. Here, however, it appears that defendant never signed the trust agreements. Rather, defendant allegedly signed a participation agreement that purported to bind defendant to the terms of the trust agreements.

Plaintiffs' first argument is that Illinois law should be applied because their right to bring this lawsuit is derived from the trust agreements, which contain a provision stating that they are to be governed by Illinois law. As a general rule, the law of the state chosen by the parties should govern their contractual rights and

duties. Section 187 Restatement (Second) of Conflict of Laws. This, however, is a lawsuit to enforce the collective bargaining agreement, not the participation or trust agreements. The gravamen of plaintiffs' complaint is defendant's failure to make contributions required by the collective bargaining agreement. That agreement contains no provision for the application of Illinois law. The Court is unwilling to say that defendant's signing of the participation agreement constituted an agreement that Illinois law would control its rights and duties under the collective bargaining agreement.

Having found that § 187 of the Restatement (Second) does not resolve the question of which state's law to apply, the Court must look to the "most significant relationship" test for the answer. *E.g., Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317 (Iowa 1977). Applying this test, the Court finds that Iowa — as the State of residence of both parties to the collective bargaining agreement — has the most significant relationship to the statute of limitations issue.

Lastly, the Court must decide which Iowa statute of limitations is most analogous to plaintiffs' federal claim. Plaintiff urges application of the ten-year limitations period for written contracts. Iowa Code § 614.1(5). The Court, however, concludes that the more analogous statute of limitations is the two-year statute for actions founded on claims for wages. Iowa Code § 614.1(8). The Code defines "wages" to include "Any payments to the employee or to a fund for the benefit of the employee, including but not limited to payments for medical, health, hospital, welfare, pension, or profit-sharing, which are due an employee under an agreement with the employer or under a policy of the employer." Iowa Code § 91A.4(c). The Court shares to some extent plaintiffs' concern that a two-year limitations period adds to the difficulties faced by the trustees, who are charged with enforcing a voluntary payment system but who are limited in their use of costly annual audits. *See Robbins v. Easter Enterprises*, Civil No. 83-687-B (S.D. Iowa Oct. 11, 1985) (order denying motion to

amend). Nonetheless, the Court does not believe that a two-year limitations period for actions to collect delinquent employee benefit plan contributions is any more at odds with the purpose or operation of federal law than would be a ten-year period. *See Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620 (3rd Cir. 1984).

Because plaintiffs' claim arose more than two years before this lawsuit was filed, the Court is compelled to grant defendant's motion for summary judgment.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is hereby granted.

Signed this 6 day of March, 1986.

(s) W. C. STUART, *JUDGE*
SOUTHERN DISTRICT OF IOWA.

Appendix C

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-1347

LORAN W. ROBBINS, MARION M. WINSTEAD; HAROLD J. YATES; EARL L. JENNINGS, JR.; HOWARD MCDOUGALL; ROBERT J. BAKER; THOMAS F. O'MALLEY; AND R.V. PULLIAM, SR.; Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and Central States, Southeast and Southwest Areas Health and Welfare Fund,

Appellants.

v.

IOWA ROAD BUILDERS COMPANY,

Appellee.

No. 86-1399

LORAN W. ROBBINS, MARION M. WINSTEAD; HAROLD J. YATES; EARL L. JENNINGS, JR.; HOWARD MCDOUGALL; ROBERT J. BAKER; THOMAS F. O'MALLEY; AND R.V. PULLIAM, SR.; Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and Central States, Southeast and Southwest Areas Health and Welfare Fund,

Appellants.

v.

EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,

Appellee.

Appeals from the United States District Court for the Southern District of Iowa

Appendix C

Submitted: December 8, 1986
Filed: September 21, 1987

Before McMILLIAN and BOWMAN, *Circuit Judges,* and CONMY,* *District Judge.*

McMILLIAN, *Circuit Judge.*

These cases have been consolidated for purposes of appeal. Appellants are the trustees of two large multiemployer employee benefit plans, the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter collectively the funds), that operate as trusts for the purpose of providing certain health, welfare and pension benefits to employees covered by collective bargaining agreements negotiated between various employers and local Teamsters unions. The funds were established pursuant to § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186(c)(5), and are governed by the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1145.

Appellants appeal from two orders entered in the District Court for the Southern District of Iowa applying Iowa's two-year statute of limitations for actions under the Iowa wage payment collection law, Iowa Code Ann. §§ 91A, 614.1(8) (West 1984 & Supp. 1987). *Robbins v. Easter Enterprises, Inc.*, 650 F. Supp. 199, 201 (S.D. Iowa 1985) *(Easter Enterprises); Robbins v. Iowa Road Builders Co.*, Civil No. 84-471-A, slip op. at 4 (S.D. Iowa Mar. 6, 1986) *(Iowa Road Builders)*. For reversal appellants

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*The Honorable Patrick A. Conmy, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

argue the district court should have instead applied either Illinois's ten-year statute of limitations for actions for breach of written contracts, Ill. Rev. Stat. ch. 110, § 13-206 (1985), pursuant to the choice of law provision in the trust agreements and conflicts of law analysis, or, alternatively, pursuant to the law of the forum state, Iowa's ten-year statute of limitations for actions for breach of written contracts, Iowa Code Ann. § 614.1(5). For the reasons discussed below, we reverse and remand each case for further proceedings consistent with this opinion.

***Robbins v. Iowa Road Builders Co.*, No. 86-1347**

Iowa Road Builders Co. (hereinafter IRB), an Iowa corporation engaged in the business of heavy construction, entered into a collective bargaining agreement with Teamsters Local 90 covering IRB employees at IRB's Ames plant, effective May 1979-April 1982. In 1981 IRB opened another plant in Des Moines; IRB and Local 90 entered into a separate collective bargaining agreement covering IRB's Des Moines employees, effective August 1981-July 1982, renewable every year. Each collective bargaining agreement required IRB to participate in the funds and to make monthly contributions to the funds at specified rates on behalf of its employees. The rate of contribution for IRB's Des Moines employees was higher than that for IRB's Ames employees. On August 1, 1981, IRB signed a "participation agreement" in which it agreed to be bound by the terms of the funds. In September 1981 IRB and Local 90 agreed that IRB's contributions for any Ames employees who were "temporarily" transferred to the Des Moines plant would be made at the lower rate for Ames employees.

Later appellants and IRB disagreed about the applicable rate of contributions to be made for certain IRB employees who worked at the Des Moines plant for several months during 1981. IRB treated these employees as only temporary transfers and thus argued that contributions to the funds for these employees were to be made at the lower Ames rate. Appellants, however, argued that

these employees should have been treated as either permanent transfers or new hires, and therefore IRB should have made contributions to the funds for these employees at the higher Des Moines rate.

On June 22, 1984, appellants filed a complaint in federal district court against IRB pursuant to LMRA § 301(a), 29 U.S.C. § 185(a), and ERISA § 502, 29 U.S.C. § 1132 (as amended by MPPAA § 306, 29 U.S.C. § 1145), to recover the delinquent contributions. Appellants sought $4,667.00 in delinquent contributions to the pension fund, $1,652.50 in delinquent contributions to the health and welfare fund, plus interest, liquidated damages, and attorney's fees and costs. IRB moved for summary judgment, arguing that this dispute arose, and thus appellants' claim for delinquent contributions to the funds necessarily accrued, at some point before November 1981, when IRB ceased operations. Thus, IRB argued, because appellants' complaint was not filed until June 1984, more than two years later, it was barred by the two-year statute of limitations applicable to Iowa wage payment collection actions. The district court agreed with IRB's statute of limitations argument and granted summary judgment in favor of IRB. *Iowa Road Builders,* Civil No. 84-471-A, slip op. at 4. Appellants appealed.

Robbins v. Easter Enterprises, Inc. (Ace Lines, Inc.),
No. 86-1399

Easter Enterprises, Inc., doing business as Ace Lines, Inc., an Iowa corporation engaged in the trucking business (hereinafter Ace Lines), entered into the following collective bargaining agreements with Teamsters Local 147: the 1976-1979 and 1979-1982 National Master Freight Agreement (NMFA), Central States Area Local Cartage Supplemental Agreement and the Central States Area Over-the-Road Supplemental Agreement. (Ace Lines also entered into similar collective bargaining agreements with Teamsters Local 544, which represented a small group of Ace Lines employees located in Minneapolis.) The

supplemental agreements incorporated the trust agreements by reference and required Ace Lines to make monthly contributions on behalf of regular employees on the payroll for 30 days to the funds. Ace Lines also executed "participation agreements" in which it agreed to be bound by the terms of the trust funds.

Under the terms of the NMFA, subcontracting was prohibited except on an "overflow" basis. The NMFA also prohibited local unions and employers from entering into agreements or "riders" to modify the terms of the NMFA without the approval of the Conference Joint Area Committee or the National Grievance Committee. The NMFA further provided that any substandard riders or riders that had not been approved by either committee were null and void.

In December 1983 appellants filed an action in federal district court against Ace Lines pursuant to LMRA § 301(a), 29 U.S.C. § 185(a), and ERISA § 502, 29 U.S.C. § 1132 (as amended by MPPAA § 306, 29 U.S.C. § 1145), to recover delinquent contributions. Appellants sought $56,011.60 in delinquent contributions to the pension fund, and $32,671.59 in delinquent contributions to the health and welfare fund, through October 19, 1983, plus interest, liquidated damages, and attorney's fees and costs. In January 1984 Ace Lines filed an answer, specifically asserting, in addition to other defenses, that appellants' action was barred by either the six-month statute of limitations applicable to hybrid § 301/breach of the duty of fair representation claims, citing *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 158 (1983) (*DelCostello*), or by the two-year statute of limitations applicable to Iowa wage payment collection actions, Iowa Code Ann. § 614.1(8).

During the fall of 1984, by agreement of the parties, fund auditors were permitted to examine Ace Lines' books and records. The auditors discovered substantial additional delinquent contributions. In November 1984 appellants filed a motion for leave to amend their complaint to add claims for the newly discovered delinquent contributions. Most of the newly discovered delinquent

contributions were due under the 1979-1982 agreements, but some were due under the earlier 1976-1979 agreements. In December 1984 appellants submitted, but did not file because the magistrate had not yet ruled on their motion for leave to amend, their first amended complaint seeking an additional $1,040,000, plus interest, in delinquent contributions to the pension fund, and $110,000, plus interest, in delinquent contributions to the health and welfare fund.

Appellants claimed that Ace Lines and Teamsters Local 147 had executed improper "riders" to the NMFA under which Ace Lines had stopped contributing to the pension fund on behalf of certain "company drivers" and "owners-operators" hired after April 1, 1979, and had instead established and contributed to non-Teamster pension funds for these employees, and had withheld contributions to the health and welfare fund until its employees had been employed for 60 days, instead of the 30 days provided in the NMFA. Appellants argued that these "riders" had not been approved by either the Conference Joint Act Committee or the National Grievance Committee and thus were invalid and unenforceable. Appellants also argued that Ace Lines' "trip-leasors" were regular employees, not subcontractors, and thus Ace Lines should have made contributions to the funds for them.

Ace Lines opposed appellants' motion for leave to amend and renewed its argument that most of appellants' claims for unpaid contributions were barred by a two-year statute of limitations. Appellants argued that their claims, even for contributions allegedly due in 1976, were not time-barred because the applicable statute of limitations was either the Illinois ten-year statute of limitations for actions on written contracts, specified by the choice of law provision in the trust agreements, or the Iowa ten-year statute of limitations for action on written contracts. Appellants argued that application of the shorter two-year statute of limitations to claims against employers for delinquent contributions due to employee benefit funds, which operate under a self-reporting

contribution system, subject to random audits, would unduly frustrate the policy objectives of ERISA.

In January 1985 the magistrate granted appellants' motion for leave to file Count I of their amended complaint, but applied the two-year statute of limitations applicable to Iowa wage payment collection actions, thus limiting appellants' claims for delinquent contributions to those due within two years of the date the action was originally filed in December 1983. *Robbins v. Easter Enterprises, Inc.* Civ. No. 83-687-B, slip op. at 2 (S.D. Iowa Jan. 23, 1985) (order of magistrate).[1] The district court affirmed the magistrate's decision but modified the order to toll the running of the two-year limitations period from December 6, 1984, the date of the amended complaint, instead of the original filing date. 650 F. Supp. at 201-02. The district court also reconsidered its characterization of the nature of the action in light of *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984) *(Schneider Moving),* and reaffirmed its view of the action as one involving enforcement of collective bargaining agreements, not trust agreements. 650 F. Supp. at 202 (Mar. 7, 1986) (order on post-trial motions). The district court then certified its order as one involving "a controlling question of law as to which there is substantial ground for difference of opinion" for immediate appeal. *Id.;* 28 U.S.C. § 1292(b). This court granted the interlocutory appeal (No. 86-1399) and consolidated the cases for purposes of appeal.

The district court's analysis of the statute of limitations defense was the same in each case. The district court acknowledged in each case that appellants' claims for delinquent contributions to the pension fund and health and welfare fund were based on ERISA, as amended by the MPPAA. *Easter Enterprises,* 650 F. Supp. at 201; *Iowa Road Builders,* Civil No. 84-

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[1] The magistrate also denied appellants leave to file Count II of their amended complaint which alleged withdrawal liability under ERISA, as amended by the MPPAA, on the grounds that withdrawal liability was subject to arbitration; the dismissal of Count II is not an issue in these appeals.

471-A, slip op. at 1. The district court, however, then characterized the "gravamen" of appellants' complaint in each case as involving the employer's "alleged failure to comply with its obligations under the collective bargaining agreements" and thus viewed these cases as actions to enforce collective bargaining agreements and not as matters of trust administration. *Easter Enterprises,* 650 F. Supp. at 201; *Iowa Road Builders,* Civil No. 84-471-A, slip op. at 2. Consequently, the district court decided that the choice of law provision contained in the trust agreements, which specified the Illinois statute of limitations for actions for breach of written contracts, was 'inapposite' to an action to enforce collective bargaining agreements. *Easter Enterprises,* 650 F. Supp. at 201; *Iowa Road Builders,* Civil No. 84-471-A, slip op. at 2. The district court decided that Iowa had the most significant relationship to the actions and that the most analogous Iowa statute of limitations was the two-year statute of limitations applicable to actions under the Iowa wage payment collection law, Iowa Code Ann. §§ 91A, 614.1(8), which specifically defines "wages" to include payments to employee benefit funds due under an agreement with the employer, *id.* § 91A.2(4)(c). *Easter Enterprises,* 650 F. Supp. at 201, *citing Teamsters Pension Trust Fund v. John Tinney Delivery Service, Inc.,* 732 F.2d 319, 322-23 (3d Cir. 1984) *(John Tinney)* (three-year statute of limitations for Pennsylvania wage payment and collection act), *and Byrnes v. DeBolt Transfer, Inc.,* 741 F.2d 620, 625 (3d Cir. 1984) *(DeBolt Transfer)* (following *John Tinney* decision as controlling, without additional analysis); *Iowa Road Builders,* Civil No. 84-471-A, slip op. at 3 (citing same 3d Cir. cases).

For reversal appellants argue the district court erred in characterizing these actions to collect unpaid contributions as actions to enforce the collective bargaining agreements. Appellants characterize these actions as actions for judicial enforcement of the trust agreements, which were incorporated by reference in the collective bargaining agreements or the participation agreements, or both, and not as labor disputes. Appellants

thus argue the district court should have applied the statute of limitations for actions for breach of written contracts, pursuant to the Illinois choice of law provision in the trust agreements or, alternatively, pursuant to the law of the forum state.

In response IRB and Ace Lines argue that the district court's view of appellants' actions as involving labor disputes and enforcement of collective bargaining agreements was correct. IRB and Ace Lines argue that because the statutory definition of "wages" specifically includes employer contributions to employee benefit funds, Iowa Code Ann. § 91A.2(4)(c), the district court correctly determined that an action under the Iowa wage payment collection law was "most analogous" to an action to collect delinquent contributions under ERISA, or the LMRA, for statute of limitations purposes. IRB and Ace Lines futher argue that because they are not parties to the trust agreements for either the pension fund or the health and welfare fund, the only "written contracts" at issue in these actions are the collective bargaining agreements, not the trust agreements.

Appellants' complaints alleged claims for breach of the trust agreements pursuant to ERISA § 302(a), 29 U.S.C. § 1132(a).[2] This statute provides a basis for federal jurisdiction, and a federal forum, for these claims. *See Schneider Moving,* 466 U.S. at 366 n.2. Because an action to collect delinquent fund contributions states a federal cause of action, appellants' arguments about the choice of law provision in the trust agreements and conflicts of law principles, arguments which are premised upon diversity jurisdiction, are inapposite. *Central States, Southeast & Southwest*

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[2] Appellants' complaints also cite LMRA § 301(a), 29 U.S.C. § 185(a). If the collective bargaining agreement does not incorporate the trust fund agreement by reference and the employer has not executed a participation agreement, then the trustees of the fund can sue the employer under LMRA § 301(a), 29 U.S.C. § 185(a), as third-party beneficiaries of the collective bargaining agreement. *Lewis v. Benedict Coal Co.,* 361 U.S. 459 (1960). On appeal, however, appellants argue that they seek enforcement of the trust agreements, not the collective bargaining agreements. Brief for Appellants at 22-24.

Areas Pension Fund v. Kraftco, Inc., 799 F.2d 1098, 1105 n.5 (6th Cir. 1986) (banc) *(Kraftco), cert. denied*, 107 S. Ct. 1291 (1987).

ERISA does not (nor does LMRA § 301(a), 29 U.S.C. § 185(a)), however, contain a statute of limitations applicable to trustee actions to recover delinquent contributions.[3] "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985) (footnote omitted) (statute of limitations applicable to 42 U.S.C. § 1983 actions); *see also DelCostello*, 462 U.S. at 170-71 (hybrid § 301/breach of the duty of fair representation claims); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966) (LMRA § 301 claims). Accordingly, we must determine the "most appropriate," *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975), or the "most analogous," *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980), Iowa statute of limitations to apply to appellants' ERISA claims. In order to do so, we must first "characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principle." *Wilson v. Garcia*, 471 U.S. at 268.

> The characterization of [a federal claim] for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law. . . . Only the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law.

Id. at 268-69 (footnote omitted); *see also UAW v. Hoosier Cardinal Corp.*, 383 U.S. at 706.

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[3] Statutory amendment would be desirable for the establishment of a uniform limitations period where, as here, the trust agreements and administration are multi-state.

Appendix C

> By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action. However, when the federal claim differs from the state cause of action in fundamental respects, the State's choice of a specific period of limitation is, at best, only a rough approximation of "the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Wilson v. Garcia, 471 U.S. at 271, *citing Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 463-64. "[S]tate law is applied only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. at 709 (White, J., dissenting).

The choice here is between actions for breach of written contracts and actions under the wage payment collection law. The district court followed the analysis of the Third Circuit and held that the state cause of action to collect unpaid wages, which are defined by the statute to include contributions to employee benefit funds, was most analogous to the trustees' federal cause of action under ERISA to collect delinquent contributions. *Easter Enterprises*, 650 F. Supp. at 201, *citing John Tinney*, 732 F.2d at 322-23, *and DeBolt Transfer*, 741 F.2d at 625 (following *John Tinney* decision as controlling, without additional analysis); *Iowa Road Builders*, Civil No. 84-471-A, slip op. at 3 (citing same 3d Cir. cases). However, for the reasons discussed below, we hold that the "most appropriate" characterization of trustee actions under ERISA to collect delinquent contributions for statute of limitations purposes is as actions for breach of written contracts. *See, e.g., Trustees for Alaska Laborers-Construction Industry Health & Security Fund v. Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987); *Kraftco*, 799 F.2d at 1105; *Trustees of Operative Plasterers' Local Union Officers & Employees Pension Fund v. Journeymen Plas-*

terers' Protective & Benevolent Society, Local Union No. 5, 794 F.2d 1217, 1221-22 n.8 (7th Cir. 1986) *(Plasterers)*. *Cf. Kraftco,* 799 F.2d at 1107-08 (LMRA § 301(a) actions); *IAM v. Allied Products Corp.,* 786 F.2d 1561, 1563 (11th Cir. 1986) (same); *Smith v. Kerrville Bus Co.,* 748 F.2d 1049, 1051 (5th Cir. 1984) (same); *O'Hare v. General Marine Transport Corp.,* 740 F.2d 160, 167-68 (2d Cir. 1984) (same), *cert. denied,* 469 U.S. 1212 (1985).

We do not find dispositive the state statutory definition of "wages" or state case law applying the state wage payment collection statute, *see, e.g., Teamsters Local Union No. 90 v. White,* 333 N.W.2d 839 (Iowa 1983). State authority is helpful, but the characterization of the federal claim for purposes of determining which state cause of action, and corresponding state statute of limitations, is most analogous is "ultimately a question of federal law." *UAW v. Hoosier Cardinal Corp.,* 383 U.S. at 706; *see also Wilson v. Garcia,* 471 U.S. at 270 & n.22.

We perceive fundamental differences between the state and federal claims that make characterization of appellants' claim under ERISA for delinquent contributions as an action under the state wage payment collection law unreasonable and inconsistent with federal labor and pension policy.[4] Although both types of actions seek the recovery of employment benefits, wage payment collection actions involve attempts by employees, or the state commissioner of labor, to obtain employment benefits directly from the employer. In general, a dissatisfied employee will realize when the employer has failed to afford him or her a particular employment benefit and can then promptly initiate an action against the employer, or file a complaint with the state commis-

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[4] Appellants' cause of action is a federal one and, to the extent that state law conflicts with either ERISA or LMRA (or the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*), it is pre-empted. *Cf. Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *National Metalcrafters v. McNeil,* 784 F.2d 817, 826-829 (7th Cir. 1986) (action for vaction pay under Illinois wage payment law held pre-empted by federal labor law in context of collective bargaining agreement).

sioner of labor, under the state wage payment collection law. In contrast, the trustees of employee benefit trust funds act as fiduciaries of the beneficiaries of the funds. *See Schneider Moving*, 466 U.S. at 372-76 & n.13, *citing NLRB v. Amax Coal Co.*, 453 U.S. 322, 337 (1981). The trustees may not discover underpayments until a beneficiary applies for benefits, which can be some years after the employment relationship has ended. Given the self-reporting system of employer contributions to the funds, the trustees may not discover a particular employer owes delinquent contributions unless and until they conduct an audit. *See Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) *(Central Transport)*.

More importantly, however, we think that the Third Circuit's position, which was followed by the district court in the present case, must be reconsidered in light of the Supreme Court's subsequent treatment of trustee actions under ERISA in *Schneider Moving* and *Central Transport*. In each case, the Supreme Court distinguished actions brought by the trustees of employee benefit trust funds to enforce the trust agreements, whether brought directly under trust agreements or indirectly as third-party beneficiaries under collective bargaining agreements, from actions brought by either unions or employers to enforce collective bargaining agreements, and clearly characterized trustee actions under ERISA as actions to enforce the trust agreements and not as actions to enforce the collective bargaining agreements. *Central Transport*, 472 U.S. at 569-82; *Schneider Moving*, 466 U.S. at 371-76; *see also NLRB v. Amax Coal Co.*, 453 U.S. at 337.

In our view, the district court and the employers placed too much emphasis upon the "labor dispute" aspects of this litigation. In the typical "labor dispute," labor and management may resort to the use of economic weapons that will disrupt "labor peace." In those situations, the courts often defer to the "relatively rapid final resolution of labor disputes favored by federal law," *DelCos-*

tello, 462 U.S. at 168, and require arbitration, *see Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578, 582-83 (1960), or apply relatively short statutes of limitation, *see DelCostello,* 462 U.S. at 161-70, in order to promote the objectives of collective bargaining and to restore labor peace. In comparison, however, these appeals involve disputes between the trustees and the employer over fund contributions in which the parties are unlikely to resort to the use of economic weapons, disputes that are essentially over matters of trust administration. As noted in *Schneider Moving,* 466 U.S. at 372 & n.13, disputes between the trustees and the employer over fund administration, like the "disputes between benefit fund trustees over the administration of the trust cannot, as can disputes between parties in collective bargaining, lead to strikes, lock-outs, or other exercises of economic power." *NLRB v. Amax Coal Co.,* 453 U.S. at 337. "Although the employer has economic weapons at its disposal, they would serve little purpose in disputes with the trustees of employee-benefit funds." *Schneider Moving,* 466 U.S. at 372 n.13.

We hold the state cause of action for breach of written contracts, and the applicable statute of limitations, is most analogous to trustee collection actions under ERISA. *See Ferrell,* 812 F.2d at 517; *Kraftco,* 799 F.2d at 1105; *Plasterers,* 794 F.2d at 1221-22 n.8.[5] Appellants' actions are not barred under Iowa's ten-year statute of limitations for actions for breach of written contracts. Accordingly, the orders of the district court are re-

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[5] We also reject application of the six-month period provided in 29 U.S.C. § 160(b) for unfair labor practice charges and applied to hybrid § 301/breach of the duty of fair representation claims in *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151 (1983). *See Trustees for Alaska Laborers-Constr. Indus. Health & Sec. Fund v. Ferrell,* 812 F.2d 512, 517 (9th Cir. 1987); *Central States, Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.,* 799 F.2d 1098, 1105-07 (6th Cir. 1986) (banc), *cert. denied,* 107 S. Ct. 1291 (1987).

versed and the cases are remanded to the district court for further proceedings consistent with this opinion.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix D

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 86-1347/1399SI

LORAN W. ROBBINS, et al.,
Appellants,

vs.

IOWA ROAD BUILDERS COMPANY, and EASTER ENTERPRISES, INC., etc.,
Appellees.

Appeals from the United States District Court for the Southern District of Iowa.

The petitions for rehearing en banc of appellants and appellee, Easter Enterprises, Inc., have been considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

November 24, 1987

Order entered at the Direction of the Court:

(s) Robert D. St. Vraim
Clerk, U. S. Court of Appeals, Eighth Circuit.

Appendix E

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-1347

LORAN W. ROBBINS, MARION M. WINSTEAD; HAROLD J. YATES; EARL L. JENNINGS, JR.; HOWARD MCDOUGALL; ROBERT J. BAKER; THOMAS F. O'MALLEY; AND R.V. PULLIAM, SR.; Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and Central States, Southeast and Southwest Areas Health and Welfare Fund,

Appellants,

v.

IOWA ROAD BUILDERS COMPANY,

Appellee.

Appeals from the United States District Court for the Southern District of Iowa

No. 86-1399

LORAN W. ROBBINS, MARION M. WINSTEAD; HAROLD J. YATES; EARL L. JENNINGS, JR.; HOWARD MCDOUGALL; ROBERT J. BAKER; THOMAS F. O'MALLEY; AND R.V. PULLIAM, SR.; Trustees of the Central States, Southeast and Southwest Areas Pension Fund, and Central States, Southeast and Southwest Areas Health and Welfare Fund,

Appellants,

v.

EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,

Appellee.

Appendix E

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this Court.

September 21, 1987

Appellants will recover from appellees the sum of $567.10 for taxable costs on appeal.

A true copy.

ATTEST: (s) Robert D. St. Vraim

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT
MANDATE ISSUED 12/17/87

Appendix F

Appendix F

Appendix G: Relevant Provisions of the LMRA and ERISA

LMRA

29 U.S.C. § 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

ERISA

29 U.S.C. § 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the

plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the

district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Appendix G

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 86-2050

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND - HOWARD MCDOUGALL, Trustee, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND - HOWARD MCDOUGALL, Trustee,
Appellants,

v.

KING DODGE, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 10, 1987
Filed: December 23, 1987

Before FAGG, *Circuit Judge,* HENLEY, *Senior Circuit Judge,* and WOLLMAN, *Circuit Judge.*

HENLEY, *Senior Circuit Judge.*

Appellants Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds and their Trustees (hereafter referred to collectively as Central States) commenced this collection action against appellee King Dodge, Inc. The sole issue on appeal is whether the district court applied the correct statute of limitations in barring all but $32.60 of Central States' claim. We reverse and remand to the district court.

Appendix G

The parties stipulated to all the relevant facts in this case. King Dodge is a party to a collective bargaining agreement which required King Dodge to make weekly contributions on behalf of its employees to a pension fund administered by Central States. As part of this obligation King Dodge executed a participation agreement assenting to the terms of Central States' Trust Agreement. For the period January, 1977 through October 15, 1985 King Dodge owes Central States $4,274.59 on its obligation to contribute to the pension fund and health and welfare fund. Central States' recovery of most of this sum is dependent on which statute of limitations is applicable to its claim.

Relevant to the statute of limitations issue the Trust Agreement provides:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

Central States argues that this provision contractually binds the parties to Illinois' ten-year statute of limitations. During the pendency of this appeal a different panel of this court determined that the Trust Agreement's choice of law provision was inapplicable in another collection proceeding brought by Central States. *Robbins v. Iowa Road Builders Co.*, 828 F.2d 1348, 1352-53 (8th Cir. 1987). The *Robbins* panel concluded that "an action to collect delinquent fund contributions states a federal cause of action. . . ." *Id.* Therefore, "arguments about the choice of law provision in the trust agreements and conflicts of law principles, arguments which are premised upon diversity jurisdiction, are inapposite," *id.* at 1353, and the most analogous statute of limitations from the forum state is applied. *Id.* The district court's holding in the present case appears to be foursquare with the decision in *Robbins* as to the inapplicability of Illinois' statute of limitations. However, because under either Illinois law or Mis-

souri law a ten-year statute of limitations applies, we need not decide definitively which state's statute to apply.

"An action upon any writing . . . for the payment of money or property" shall be commenced within ten years. Mo. Ann. Stat. § 516.110(1) (Vernon 1952). All other actions upon contracts are to be commenced within five years. Mo. Ann. Stat. § 516.120(1) (Vernon 1952). Central States has previously litigated this issue in the Missouri district courts, both times resulting in the application of the five-year statute of limitations. *Central States, Southeast & Southwest Areas Pension Fund v. Aalco Express Co.*, 592 F.Supp. 664, 666 (E.D. Mo. 1984); *Robbins v. Newman*, 481 F.Supp. 1241, 1243 (E.D. Mo. 1979) (hereafter *Newman*). *Central States* is of little analytic value in the present case because there Central States admitted the applicability of § 516.120(1) and the gravamen of the decision was the effect of the choice of law provision in the Trust Agreement. 592 F.Supp. at 666.

The applicability of the reasoning in *Newman* is more troublesome. Fortunately, the Missouri Court of Appeals has recently addressed the distinction between the two statutes.

> It is the evolved principle of our decisions that, in order for the ten-year limitations period of § 516.110 to appertain, the writing must be not only for the payment of money, but also must contain a "*promise to pay money*. . . ." Once that obligation is found from the writing, the exact amount to be paid or other detail of the obligation may be shown by extrinsic evidence - *but not the promise itself.*

Superintendent of Insurance of New York v. Livestock Market Insurance Agency, Inc., 709 S.W.2d 897, 900 (Mo. Ct. App. 1986) (emphasis in the original) (citation omitted). In *Newman* the individual defendants' liability was at issue; thus the promise to pay money required proof through extrinsic facts. *Newman*, 481 F.Supp. at 1243; *see Superintendent of Insurance of New York*, 709 S.W.2d at 900 ("Thus, although in [*Martin v.*]

Potashnick [358 Mo. 833, 217 S.W.2d 379 (1949)], there was a writing - an open account - that some indebtedness existed, that the debt was due and payable was determinable only by extrinsic evidence, and hence the contract was not a promise to pay money within § 516.110.") This case, however, is distinguishable from *Newman*. King Dodge does not deny its liability (apart from the statute of limitations defense) to pay Central States under the Trust Agreement. King Dodge asserts in its brief that because extrinsic evidence (*i.e.*, the number of employees) is necessary to calculate the total debt due that § 516.110(1) does not apply. As we have seen, however, extrinsic evidence may be used to prove the exact amount owing. *Superintendent of Insurance of New York*, 709 S.W.2d at 900. " '[T]he essence of a promise to pay money is that it is an acknowledgment of an indebtedness, *an admission of a debt due and unpaid*.' " *Id.* (quoting *Potashnick*, 358 Mo. at ___, 217 S.W.2d at 381) (emphasis by the court). Because King Dodge's promise is contained within the four corners of the writing, § 516.110(1) is the applicable statute of limitations if Missouri law applies.

Since under either Missouri or Illinois law a ten-year period of limitations applies, the decision of the district court is reversed and the cause is remanded for application of a ten-year statute of limitations and for further proceedings not inconsistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(2)

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1498

IN THE
Supreme Court of the United States
October Term, 1987

LORAN W. ROBBINS, MARION M. WINSTEAD, ROBERT S. SANSONE, R. JERRY COOK, HOWARD McDOUGALL, ROBERT J. BAKER, R.V. PULLIAM, SR., AND ARTHUR H. BUNTE, JR., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Cross-Petitioners,

v.

IOWA ROAD BUILDERS COMPANY and EASTER ENTERPRISES, INC. d/b/a ACE LINES, INC.,

Cross-Respondents.

CROSS-RESPONDENTS' RESPONSE IN OPPOSITION TO CROSS-PETITIONERS' CONDITIONAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND APPENDIX

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June 9, 1988

19 pp

QUESTION PRESENTED

DOES A CHOICE OF LAW PROVISION IN THE TRUST INDENTURE OF A TAFT-HARTLEY FUND WHICH SELECTS THE SUBSTANTIVE LAW OF THE FUND'S SITUS HAVE THE EFFECT OF ALSO REQUIRING THE PROCEDURAL LAW OF THAT SITUS STATE TO BE USED IN ACTIONS BROUGHT IN FOREIGN JURISDICTIONS UNDER §301 LMRA and §515 ERISA TO COLLECT EMPLOYER CONTRIBUTIONS TO THE FUND?

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No identifiable reason recognized by this Court has been asserted by Central States for granting its Conditional Cross-Petition for Writ of Certiorari.

AND

There is no split among the Circuit Courts of Appeal on the issue which Central States seeks an opinion in its Cross-Petition For Writ of Certiorari.

AND

Central States in its Cross-Petition for Writ of Certiorari, seeks an advisory opinion of this Court outside of the existing case or controversy.

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IN THE

Supreme Court of the United States

October Term, 1987

No. 87-1498

LORAN W. ROBBINS, MARION M. WINSTEAD, ROBERT S. SANSONE, R. JERRY COOK, HOWARD McDOUGALL, ROBERT J. BAKER, R.V. PULLIAM, SR., AND ARTHUR H. BUNTE, JR., TRUSTEES OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

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IOWA ROAD BUILDERS COMPANY and EASTER ENTERPRISES, INC. d/b/a ACE LINES, INC.,

Cross-Respondents.

CROSS-RESPONDENTS' RESPONSE IN OPPOSITION TO CROSS-PETITIONERS' CONDITIONAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner and Cross-Respondent, Easter Enterprises, Inc. d/b/a Ace Lines, Inc. (hereinafter referred to as "Ace Lines") pursuant to the Rules of this Court and the directive of this Court dated May 10, 1988 hereby submits this Response in Opposition to the Conditional Petition For Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit filed by the Respondents, Central States, herein.

RESPONDENTS' STATEMENT OF THE CASE

Ace Lines, Inc. rejects Central States' statement of the case contained in its combined case statement and argument. Rather than attempt to thresh out Central States' statement of the case from the argument, Ace Lines elects to incorporate by this reference, its statement of the case as set forth in its own Petition for Writ of Certiorari filed on February 19, 1988. In the light of Central States' Cross-Petition, the only supplement that needs to be made is to note that on January 23, 1985,[1] United States Magistrate R.E. Longstaff applied the Iowa two-year wage payment and benefit collection statute of limitations to Central States' attempt to amend its complaint and ruled that Central States could not assert ERISA withdrawal liability without first arbitrating the matter.

REASONS NOT TO GRANT CENTRAL STATES' PETITION

1. No identifiable reason recognized by this Court has been asserted by Central States for granting its Conditional Cross-Petition for Writ of Certiorari.

2. There is no split among the Circuit Courts of Appeal on the issue which Central States seeks an opinion in its Cross-Petition For Writ of Certiorari.

3. Central States in its Cross-Petition for Writ of Certiorari, seeks an advisory opinion of this Court outside of the existing case or controversy.

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[1]The Magistrate's opinion is reprinted in Ace Lines' Appendix hereto. The Magistrate's decision is referred to in the decision of the Court of Appeals for the Eighth Circuit in *Robbins v. Iowa Road Builders, et al.*, at p. 8a of the Appendix filed therein in support of Ace Lines' Petition for Writ of Certiorari.

ARGUMENT

1. ***No identifiable Reason Asserted by Cross-Petitioner For Granting the Writ of Certiorari.*** Central States, in its Conditional Cross-Petition for Writ of Certiorari, assiduously avoids identifying any specific reason or reasons that would justify the granting of the requested writ of certiorari under Sup. Ct. R. 17.[2]

Failure of the Cross-Petitioner to articulate a reason or reasons for granting the writ under Sup.Ct.R. 17 does not impose on Cross-Respondent a burden to demonstrate that no reason exists. Rather, the Cross-Petition should simply be denied for failure to state a recognized reason for granting the writ. To prevail in its opposition to the granting of the writ, Cross-Respondent is not required to do more than resist on the basis of the failure of the Cross-Petition to comply with Sup.Ct.R. 17 by identifying a specific reason or reasons that would justify granting of the requested writ of certiorari.

2. ***There Is No Split Among The Circuit Courts of Appeal on The Issue On Which Cross-Petitioner Seeks The Opinion Of This Court.*** Central States alleges it has filed a Conditional Cross-Petition for Writ of Certiorari, "in order to preserve its ability to argue the specific question *whether parties to a multiemployer employee benefit trust can [sic] select the 'most appropriate' statute of limitations by contractual agreement.*" C.S. Cross-Petition pp. 6-7. (Emphasis added)

In its Conditional Cross-Petition, Central States does not cite any United States Court of Appeals decision which either supports or rejects Central States' position on the issue on

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[2]This also constitutes failure to comply with Rule 21.1(j) of this Court.

which it now[3] seeks this Court's opinion. Indeed, Central States fails to cite *any* federal case that decides the issue Central States here seeks to raise. The best the Cross-Petition does in citing a case in point is:

> [f]orum selection clauses having the same practical effect as an agreement upon the statute of limitations were upheld by this Court as *prima facie* valid. *The Bremen v. Zapta Off-Shore Co.*, 407 U.S. 1 (1972) (case arising under federal admiralty law).

Conditional Cross-Petition, p. 5.

This use of *The Bremen v. Zapta Off-Shore Co.*, 407 U.S. 1 (1972) (case arising under federal admiralty law) by Central States is significant in two respects. First, it is a serious distortion of *Bremen* [4]. Second it is a forceful demonstration of the

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[3]Central States' issue statement contained in its Conditional Cross-Petition For Certiorari is based upon the trust agreement language in effect *after* March of 1985, while its arguments in this case as to its 1983 complaint and its 1984 proposed amendment are based upon the trust agreement language in effect *prior* to March of 1985. See footnote 2 in the Central States Conditional Cross-Petition for Writ of Certiorari at p. 3.

[4]*Bremen* does not involve the issue of the selection of the correct statute of limitations. It does involve the issue of whether parties to a contract involving the towing of complex machinery across "thousands of miles" of sea may provide in their contract that the London Court of Justice may adjudicate any disputes that arise. To argue, that by analogy, this Court in *Bremen* has approved contract clauses allowing parties to lengthen applicable statutes of limitations, shows just how far Central States had to reach to attempt to assert that there is some basis for this Court to grant the requested writ of certiorari. Even if one were to completely swallow Central States' analogy and consider it to be a good one there is a serious flaw. In *Bremen* this court did not say that the parties could by contract "oust" the United States courts of jurisdiction, but only that they could confer jurisdiction on the London Court of Justice. 407 U.S. 12. More significant for current purposes, however, is the Court's rationale for its holding. "There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or over-

complete lack of any split[5] in the circuits on the issue which Central States now seeks to raise and the extreme paucity of cases even remotely dealing with this issue. Certainly, the issue cannot be said to be one of immediate judicial concern or attention. The absence of cases dealing with it, is convincing evidence of this.

Ace Lines, as Cross-Respondent, is not obligated to undertake to demonstrate that every known reason for granting a writ of certiorari that is listed in Sup.Ct.R. 17 is not present here.

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weening bargaining power, such as that involved here, should be given full effect." 407 U.S. 12-13. In no way can Central States' Trust indentures be said to be "a freely negotiated private international agreement unaffected by . . . overweening power." Under MEPPAA, Central States can impose on employers who do not agree to changes in its trust indentures, withdrawal liability into the millions of dollars. Any employer who does not "agree" to the change can be rejected by Central States and that triggers the withdrawal liability. If this is not "overweening power" it is hard to imagine what would be. Also, although Central States' reach is large, it is probably fair to say its trust indentures are not fundamentally "international" in character.

[5]In its Petition For Writ of Certiorari, Ace Lines relies, in part, on the split in the decisions of the Circuit Courts of Appeal. Two Circuit Courts of Appeal have decided cases involving the "borrowing" of state wage payment and benefit collection statutes of limitation. They are the Third Circuit in *Byrnes v. DeBolt Transfer, Inc.*, 741 F.2d 620 (3rd Cir. 1984) and *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984) and the Eighth Circuit in the current case, styled as *Robbins v. Iowa Road Builders, et al.*, 824 F.2d 1348 (8th Cir. 1987). The Sixth and Ninth Circuits have also decided cases involving the appropriate statute of limitations to be borrowed in §301 LMRA and §515 ERISA cases for collection of contributions to employee benefit funds. Those cases, however, involved Tennessee, Alaska and Hawaii, none of which had a separate wage payment and benefit collection statute of limitation. All three states also make no distinction in their statutes of limitations between oral contracts and those that are in writing.

[6]See discussion at p. 3 of this response in opposition.

3. ***Central States Seeks An Advisory Opinion Not An Adjudication Of An Actual Case Or Controversy.*** United States Magistrate R.E. Longstaff on January 23, 1985, ruled that in accord with *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984) the Iowa two-year wage payment and benefit collection statute of limitations was applicable to the proposed amended complaint that Central States sought to file on November 8, 1984, raising new interpretive issues. Central States responded: 1) by appealing the magistrate's ruling and 2) by amending, in March 1985, its trust indentures. Prior to March 1985 the trust indentures provided:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

Article XIV Section 7 of the Trust Agreement governing the Pension Fund and Article XI, Section 7 of the Trust Agreement governing the Health and Welfare Fund all as quoted in footnote 2 page 3 of Central States' Conditional Cross-Petition For Writ of Certiorari.

Following the Magistrate's decision in this case on January 23, 1985, Central States, in March of 1985, amended its trust indentures to add the language in italics below:

> This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States. *In all actions taken by the Trustees to enforce the terms of this Trust Agreement, including but not limited to actions to col-*

> *lect delinquent contributions from employers or to conduct audits of contributing employers' records as authorized by Article III of this Agreement, the ten-year Statute of Limitations applicable to actions on written contracts in the State of Illinois shall apply.*

Footnote 2 page 3 of Central States' Conditional Cross-Petition For Writ of Certiorari.

On appeal to United States District Court Judge William Stuart, Central States argued that the language in the trust agreements prior to the amendment of March 1985 had the effect of requiring the District Court to apply the Illinois procedural law to this action which Central States had commenced in Iowa. Judge Stuart concluded:

> Although plaintiffs' right to institute this lawsuit is derived from ERISA and the Trust Agreements, the gravamen of plaintiffs' complaint is defendant's alleged failure to comply with its obligations under the collective bargaining agreements. Consequently, the Court agrees with defendant that the Illinois law proviso of the trust agreements is *inapposite*.

Appendix to Ace Lines' Petition for Writ of Certiorari, p. 25a.

Upon appeal to the United States Court of Appeals for the Eighth Circuit, Central States again advanced its argument that the language of the trust agreements, in effect prior to March of 1985, required the U.S. District Court sitting in Iowa to apply the Illinois procedural law to the action brought in that Court in 1983 by Central States and to the amended complaint which it sought to file in 1984. The Court of Appeals, while reversing the district court on which Iowa statute of limitations to apply, sustained the district court in rejecting Central States' Illinois contract theory.

> Appellant's complaints alleged claims for breach of the trust agreements pursuant to ERISA §302(a), 29 U.S.C. §1132(a). This statute provides a basis for federal jurisdiction, and a federal forum, for these claims. *See Schneider Moving*, 466 U.S. at 366 n.2. Because an action to collect delinquent fund contributions states a federal cause of action, appellants' arguments about the choice of law provision in the trust agreements and the conflicts of laws principles, arguments which are premised upon diversity jurisdiction, are ***inapposite***. *Central States, Southeast & Southwest Areas Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098, 1105 n.5 (6th Cir. 1986) (banc) (Kraftco), *cert. denied*, 107 S.Ct. 1291 (1987).

Robbins v. Iowa Road Builders, Appendix p. 11a. (Footnote omitted) (emphasis added).

Both the District Court and the Court of Appeals rejected as "inapposite" Central States' argument that the trust agreement language in effect prior to March of 1985 mandated the United States District Court sitting in Iowa to apply Illinois procedural law to this action which Central States elected to bring in the United States District Court for the Southern District of Iowa. It is true, that after the magistrate ruled adversely to Central States in January of 1985, it did, in March of that year, modify its trust agreement language in an attempt to negate the future effect of rulings such as the magistrate's. Central States has not argued below[7] and does not argue in

[7]At page 7 of its brief in resistance to Ace Lines Petition for Writ of Certiorari, Central States sets forth a case holding that a party may not raise here issues not raised below.Central States, in its argument, overlooks the fact that the issue of the ERISA three- and six-year statutes of limitations was raised in Ace Lines' Petition for Rehearing, which like Central States own petition for rehearing, was denied. The point is, that Central States recognizes that it cannot here assert for the first time, some theory of retroactive application of the March 1985 trust indenture modifica-

its Conditional Cross-Petition that the language change in March of 1985 somehow retroactively changes the law and agreements in effect at the time Central States commenced this action in 1983 or sought to amend its complaint in 1984.

What Central States, by its Conditional Cross-Petition, is seeking is an advisory opinion as to the future applicability and validity of its amended trust agreement language for cases that arise after the language was changed in 1985. To Central State's credit, it virtually admits in its petition that an advisory opinion is what it seeks.

> Hence, the enforceability *vel non* of the 'choice of law' provision is an issue of utmost practical significance to the Central States Funds (and to the Trustee of other funds who may likewise wish to facilitate a uniform remedy through the vehicle of the fund's agreements).

Conditional Cross-Petition p. 6.

While Central States' candor, in apparently admitting it seeks an advisory opinion is refreshing, it does not provide a basis for granting a writ of certiorari where one does not otherwise exist. The reality is and remains that Central States failed to articulate, in its Cross-Petition, a recognized reason for granting certiorari, not through oversight, but because no such reason exists.

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tion. Ace Lines does not consider that Central States has attempted to make such an argument and, indeed, such an argument would not only fail as being timely, but even if considered on its merits would be found to have none, since not even Central States can point to any language in the amendment purporting to confer retroactive effect to lawsuits already commenced.

CONCLUSION

Ace Lines will concede that it would be of use to Central States to have this Court render an advisory opinion as to whether Central States' trust agreement amendments of March 1985 will accomplish the purpose which Central States says it seeks in its Conditional Cross-Petition: namely, establishing an uniform statute of limitations through imposing, by alteration of its trust indentures, the Illinois ten-year statute of limitations for written contracts.

Such a view of the role of Central States is not only arrogant but leads to a serious misperception of the requirements for obtaining a writ of certiorari in this Court.

The bold assertions of Central States demonstrate that delay in granting Ace Lines' Petition for Writ of Certiorari will needlessly provoke further litigation and forum shopping. Alternatively, granting the Conditional Cross-Petition for Writ of Certiorari will simply compel Ace Lines to litigate an issue in this Court not raised in the lower courts and will materially weaken this Court's standards for the granting of the writ.

The matter raised by Ace Lines in its Petition for Writ of Certiorari, is currently being addressed by federal courts throughout the nation with no common rationale or uniformity of result as is so essential in statutes of limitation cases. Particularly this is true where, as here, the sums at stake are of such substantial magnitude for so many. Conversely, Central States' theory, as advanced in its Conditional Cross-Petition, is not now the subject of significant litigation. That it might become such in the future is not a basis for abandoning this Court's standards for when certiorari shall be granted

and for imposing on Ace Lines a duty to argue theories and language not relevant to its case.

Respectfully submitted,

/s/David H. Goldman
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June 9, 1988

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

LORAN W. ROBBINS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL NO. 83-687-B
	)	
vs.	)	ORDER
	)	
EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,	)	
	)	
Defendant.	)	

This matter is now before the Court upon the motion of the plaintiffs seeking to file a first amended and substituted complaint. The motion was filed November 8, 1984 with a resistance being filed November 14, 1984. The proposed amended complaint was then submitted to the Court and defendant filed a brief in support of its resistance on January 4, 1985. Plaintiffs then filed a brief in support of its motion on January 15, 1985. The matter was orally argued in front of the undersigned Magistrate on January 10, 1985. Appearing at the argument were Paul Zoss on behalf of the plaintiffs and John Black and David Goldman on behalf of the defendant.

Plaintiffs' proposed amended complaint presents several difficult issues pertaining to the proper statute of limitations, the tolling thereof, and whether certain matters are subject to mandatory arbitration proceedings. After carefully reviewing the briefs submitted by the parties and the arguments made on January 10, 1985, the Court finds as follows:

1. Plaintiffs' claim for contributions being asserted in Count I of the amended complaint is controlled by the two-year statute of limitations contained in Section 614.1(8) of the Iowa Code. *Teamsters Pen. Tr. Fund v. John Tinney Deliv. Serv.*, 732 F.2d 319 (3rd Cir. 1984). Accordingly, plaintiffs' claims being asserted in Count I should be limited to the time period extending two years from the date this action was originally filed unless plaintiffs wish to claim the applicable statute of limitations has been tolled.

2. If plaintiffs intend to assert a tolling of the two-year statute of limitations, which is the position they appear to assert in their brief filed January 15, 1985, Count I of their amended complaint may include that period of time which plaintiffs' claim is covered by the tolling provision. In making this assertion, however, plaintiffs must be aware that although they claim defendant's reporting obligation is based on contract and characterized that reporting duty as a fiduciary status, it is equally important to note that the same contract gives the plaintiffs the right to conduct periodic audits. Accordingly, if plaintiffs did not conduct those audits with due diligence, the plaintiffs will have a difficult time supporting their tolling assertion. However, because of the lack of a factual record at this stage of the litigation and the fact that the Court is now simply ruling on a motion to amend, it would be inappropriate for the Court to make a judgment at this juncture as to what would be an appropriate date to permit plaintiffs to extend defendants' liability through its tolling assertion.

3. In Count II of the amended complaint, plaintiffs are asserting that defendant has withdrawn from their pension plan and, under the withdrawal provisions of ERISA, defendant is now liable for a substantial withdrawal payment. The Magistrate finds that this claim cannot be asserted without submitting the matter to arbitration. *Republic Industries, Inc. v. Cen-*

tral Pennsylvania Teamsters Pension Fund, 693 F.2d 290, 294 (3rd Cir. 1982); *Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 634 (4th Cir. 1983). Accordingly, the Court finds that at the present time, Count II does not state a claim for relief and the plaintiffs' motion to amend insofar as it seeks to add Count II will be denied.

4. In view of the fact that the Court has partially allowed plaintiffs to amend as set forth above, the Court finds that substantial new issues have been added to this litigation and the case should be removed from the April 15, 1985 trial calendar. The final pretrial conference scheduled for March 21, 1985 shall now be held as a scheduling conference. Plaintiffs shall submit an amended complaint conforming to the direction provided above within 20 days.

IT IS SO ORDERED.

Dated this 23rd day of January, 1985.

/s/ R.E. Longstaff
R.E. LONGSTAFF
U.S. MAGISTRATE

FILED
JAN 23 1985
4:45 PM
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1498

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

LORAN W. ROBBINS, et al.,
Cross-Petitioners,

v.

IOWA ROAD BUILDERS COMPANY and
EASTER ENTERPRISES, INC., d/b/a ACE LINES, INC.,
Cross-Respondents.

CROSS-PETITIONERS' REPLY TO CROSS-RESPONDENT ACE LINES' OPPOSITION TO CONDITIONAL CROSS-PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

May the parties to a trust agreement governing multiemployer employee benefit trust funds contractually agree to a statute of limitations to govern Trustee collection actions arising under the LMRA and ERISA in the absence of a limitations period in either statute or a generally applicable federal statute of limitations?

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STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds ("Central States") seeks *denial* of certiorari in this case. Out of an abundance of caution, however, Central States has filed its *Conditional* Cross-Petition in order to present an alternate basis, rejected by the court below, upon which to affirm the judgment if review is granted. Therefore, the Conditional Cross-Petition seeks to present the spectrum of possibilities which should be considered by this court if it decides to consider the "most appropriate" statute of limitations for trustee collections actions under ERISA. Viewed in this light, it is not important whether the requirements of Rule 17 have been technically met. All that Central States seeks is an opportunity, *if* review is granted, to persuade this Court that the Funds' trust agreement, not the Iowa statute, *provided* the proper basis for determining a limitations period of 10 years.

In two previous decisions, this Court has enhanced the utility of the Trust Agreements as uniform enforcement mechanisms designed to promote and protect the collective interests of all of the parties to the trusts. In *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364 (1984), the Court ruled that the Trustees could pursue their remedies against delinquent employers directly in federal court without first resolving disputed terms of collective bargaining agreements in arbitration. In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport,* 472 U.S. 559 (1985), the Court ruled that the Trustees could audit the records of an employer's complete workforce to verify the accuracy of reporting and contributions. In the present action, Central States seeks enforcement of the "choice of law" provision of the Trust Agreements which, both prior and subsequent to March 1985, requires courts to look to Illinois law in selecting the statute of limitations for collection actions arising under the LMRA and ERISA.

Seeking to persuade the Court not to grant Central States' Conditional Cross-Petition, Cross-Respondent asserts that Central States has advanced no reason under Supreme Court Rule 17

for granting the writ and that Central States seeks merely an advisory opinion. These assertions are wholly meritless. The question whether parties to a multiemployer trust may, as a matter of federal law, contractually agree to a limitations period to govern trustee delinquency actions arising under ERISA and the LMRA raises an issue of great national importance, potentially affecting every fund that is governed by a comprehensive trust agreement and hence all employers contributing to such funds. That Central States does *not* seek an advisory opinion is evidenced by the text of the Court of Appeals decision itself which rejected the "choice of law" provision in favor of the Funds' *alternative* theory.

Hence, if review is granted at all, the spectrum of possibilities presented by both Petitions should be considered, including a contractual limitations period. In reply to Cross-Respondent's opposition, however, Central States will address only the issue whether the Conditional Cross-Petition seeks an advisory opinion.

ARGUMENT

CENTRAL STATES' CROSS-PETITION DOES NOT SEEK AN ADVISORY OPINION RATHER THAN ADJUDICATION OF AN ACTUAL CASE OR CONTROVERSY

For decades prior to March 1985, the Central States Trust Agreements provided that matters of trust administration falling within the scope of the above instruments would be governed "in all respects" by Illinois law except as preempted by federal law. Since ERISA and the LMRA do not contain a statute of limitations governing trustee collection actions and since state law is not merely *not* preempted but provides the *primary source* for filling the legislative gap, the Trustees historically and consistently construed the term "in all respects" to include procedural as well as substantive matters and hence to require application of the Illinois statute of limitations. Since passage of ERISA, the Trustees' construction of the Trust Agreement has been upheld by several district courts, thereby evidencing the reasonableness of this interpretation.[1]

Nevertheless, in March 1985 the Trustees determined to clarify the "choice of law" provision to avoid perceived ambiguity and thus the need for wasteful litigation. Consistent with this Court's ruling in *Schneider*, the Trustees amended the clause to provide that all actions to enforce the terms of the Trust Agreement, including actions to collect delinquent contributions and to conduct audits, would be governed by Illinois' ten-year statute of limitations for actions on written contracts. From the Trustees'

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[1] *Central States, Southeast and Southwest Areas Pension Fund v. Elkhart Beverage Co.*, No. S-84-0304 (N.D. Ind. 1986); *Central States, Southeast and Southwest Areas Pension Fund v. J.P. Ryan*, No. 84-CV-0317-DT (E.D. Mich. 1985); *Central States, Southeast and Southwest Areas Pension Fund v. R&W Service Systems, Inc.*, No. 78-72648 (E.D. Mich. 1981). Copies of these unpublished decisions were included in an Addendum to the appeal brief. See also, *Central States, Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 586 F.Supp. 1061 (M.D. Tenn. 1981), *rev'd on other grounds*, 799 F.2d 1098 (6th Cir. 1986).

perspective, the two provisions differ only in form and not in substance. Hence, as Cross-Respondent concedes (Br. pp. 8-9), Central States did not and had no occasion to argue to the courts below that it was relying on the 1985 version of the Trust Agreement which should be retroactively applied.

Moreover, as Cross-Respondent well knows, Central States did not attempt to conceal or gloss over the existence of two versions of the "choice of law" provision at any stage of the present litigation. Indeed, Central States submitted the March 1985 Trustee resolution to the District Court together with an Affidavit of Ronald J. Kubalanza (now Executive Director of the Funds), in which Mr. Kubalanza authenticated the Trustee resolution and amendment while also confirming that the prior version had been historically and consistently construed as requiring application of Illinois' ten-year statute of limitations for actions on written contracts. These materials were included in the Joint Appendix filed in the Eighth Circuit (pp. 129-133, 139-144). Further, Central States' opening Brief on Appeal contained a four-page subsection addressed to the pre-1985 language, captioned: "The Trust Agreements contain a 'choice of law' provision which the Trustees have reasonably construed as encompassing an agreement to comply with the Illinois statute of limitations." (pp. 22-26). And, of course, the text of both versions of the provision appears at fn.2 of Central States' Conditional Cross-Petition.

In the courts below, Cross-Respondent did not oppose enforcement of the "choice of law" provision on the grounds that the Illinois statute of limitations could apply only through retroactive application of the amended version. Rather, Ace Lines argued, and was understood to argue, only that the *Trust Agreement* itself was "inapposite" since Central States was attempting to collect delinquent contributions under disputed terms of a *collective bargaining agreement*.

Ruling that the two-year statute of limitations applicable to actions arising under Iowa's Wage Payment Collection Law was most analogous to Trustee collection actions arising under ER-

ISA and the LMRA, the District Court agreed with Cross-Respondent that the Trust Agreement choice of law provision was "inapposite" to actions seeking to enforce a collective bargaining agreement. Although the Court of Appeals for the Eighth Circuit reversed, holding that Iowa's ten-year statute of limitations for actions on written contracts was most appropriate, the court also rejected the Trust Agreement "choice of law" provision as "inapposite" to actions arising under federal law (as distinct from actions over which a federal court had merely diversity jurisdiction).

Significantly, neither the Magistrate nor the District Court nor the Court of Appeals distinguished between the pre-1985 and post-1985 versions of the "choice of law" provision, thereby implicitly accepting the Trustees' view that the amended provision merely clarified the drafters' original intent, changing only form not substance.[2] Hence, there is no merit whatsoever for Cross-Respondent's contention that Central States is seeking an advisory opinion.

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[2]See the Eighth Circuit's subsequent decision, *Central States, Southeast and Southwest Areas Pension Fund v. King Dodge,* 835 F.2d 1238 (8th Cir. 1987), reprinted as Appendix G to Conditional Cross-Petition (30a-33a). This action arose under the pre-1985 Trust Agreement and the "choice of law" provision, in its unamended form, was quoted in the text. (31a). The Court did *not* rule that the Trust Agreement was "inapposite" either in reliance on the *Ace Lines* decision or because the Trust Agreement was not sufficiently clear; rather, it stated that "because under either Illinois law or Missouri law a ten-year statute of limitations applies, we need not decide definitively which state's statute to apply." In *Central States, Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.,* 799 F.2d 1098 (6th Cir. 1986), cited by the *Ace* panel, the Sixth Circuit rejected the Trust Agreement "choice of law" provision as being inapposite to actions arising under federal law, also without distinguishing the pre-1985 and post-1985 versions. It may be noted parenthetically that the existence of those two reported decisions rebuts Cross-Respondent's assertion that there is no judicial interest in Central States' position with regard to enforcement of the Trust Agreements. (Brief, pp. 4-5).

CONCLUSION

Contractual limitations periods are well-known in the law and have been looked upon with increasing favor by this and other courts. There is particularly good reason for the trustees of multiemployer, multistate employee benefit funds to provide for a definite limitations period in the absence of a federal statute of limitations or a ruling of this Court that the law of the forum state must always apply. Enforcement of the Trust Agreements' "choice of law" provision, and hence Illinois' ten-year statute of limitations, is of utmost practical significance to the Central States Funds, enabling the Trustees to better vindicate the rights afforded them through this Court's previous rulings.

At all stages of the present litigation, Central States sought a ruling that the Trust Agreement "choice of law" provision was not only enforceable but that enforcement best promoted national pension policy by providing consistent applications of the trust provisions and by permitting a greater recapture of delinquent contributions. Neither Central States nor the courts below distinguished between the pre-1985 and post-1985 version of the provision, and there is no basis for the view that Central States seeks an advisory opinion, merely because a ruling permitting a contractual limitations period could also provide guidance to the trustees of other funds for future conduct.

For all the reasons stated above and in its Conditional Cross-Petition, review should be granted if the Court decides to grant Cross-Respondent's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: June 20, 1988